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No. 97-705

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KERR-MCGEE CORPORATION
and CYPRUS FOOTE MINERAL COMPANY,
Petitioners,
v.
KEE TOM FARLEY, Individually and
on Behalf of the Estate of LUCY K. FARLEY,
CARMELITA FARLEY JOE,
and HAROLD KADY, SR., Individually and
on Behalf of the ESTATE OF JULIA MAE KADY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE MONTANA SCHOOL BOARDS ASSOCIATION AND D.H. BLATTNER & SONS, INC. IN SUPPORT OF THE PETITION

JON METROPOULOS
Counsel of Record
GOUGH, SHANAHAN, JOHNSON
& WATERMAN
P.O. Box 1715
Helena, MT 59624-1715
(406) 442-8560

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BRIEF *AMICI CURIAE* OF THE MONTANA SCHOOL BOARDS ASSOCIATION AND D.H. BLATTNER & SONS, INC. IN SUPPORT OF THE PETITION

The Montana School Boards Association ("MSBA") and D.H. Blattner and Sons, Inc. ("Blattner") respectfully submit this brief *amici curiae* pursuant to S. Ct. R. 37 in support of the petition for writ of certiorari.[1] Letters

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[1] Counsel for the parties did not participate in the drafting of this brief, and no one other than the *amici curiae* made a monetary contribution to its preparation or submission.

of Consent from counsel for all parties have been filed with the Clerk.

INTEREST OF *AMICI CURIAE*

A. Montana School Boards Association

MSBA is a voluntary association whose membership is comprised of approximately three hundred (300) public school boards in the State of Montana. The stated goal of MSBA is to promote the best education possible for the children of Montana with the resources that are available. MSBA has been active on the state level since 1926 in examining problems relating to public education and in seeking resolutions to those problems.

Each member school board is made up of a varying number of trustees, with annual elections conducted to fill staggered three-year terms. *See* §§ 20-3-301, 20-3-304, MCA. The school boards are constitutionally vested with the supervision and control of the individual schools within their respective school districts. *See* Montana Constitution, Art. X, Sec. 8. The school districts themselves are, in turn, political subdivisions and instrumentalities of the State of Montana. *Teamsters, Chauffeurs, Warehousemen and Helpers, Local #45 v. Cascade County School District No. 1*, 162 Mont. 277, 511 P.2d 339, 341 (1973). Of the approximately 300 MSBA-member school boards, 27 are charged with the supervision and control of school districts whose geographical boundaries include territory lying within the exterior boundaries of one or more of the seven federal Indian reservations in the State of Montana.

Concomitant with their constitutionally-vested control and authority, school boards are subject to extensive regulation and control by the Montana Legislature, the Montana Board of Public Education and the Montana Office of Public Education. They are, of course, subject to extensive federal regulation in certain areas as well. Aspects of that regulatory framework are directly mani-

fested in the form of established procedures designed solely for the purpose of resolving disputes that may arise as a result of actions taken by a school board, the district it governs, or a school or school official within that district.

For example, Montana has a specific administrative procedure for the resolution of "matters of controversy" that arise ". . . [as a result of the decisions of a school board] . . ." *See* § 20-3-210, MCA; § 10.6.101 *et seq.*, ARM. Examples of the types of disputes that can conceivably fall within the ambit of that process include such things as student discipline matters, student transportation disputes, etc. This process involves a *de novo* administrative hearing concerning the disputed school board action subject to a subsequent process of administrative and judicial review. The Montana Supreme Court has held that, except in very limited circumstances, aggrieved parties in "school controversy" matters are required to exhaust this administrative process prior to pursuing such claims in state district court. *See e.g., Canyon Creek Education Association v. Board of Trustees, Yellowstone County School Dist. No. 4*, 241 Mont. 73, 785 P.2d 201, 203 (1990).

The procedure for dealing with dismissal of teachers from employment is also governed by its own administrative procedure and provides another example. *See e.g.*, §§ 20-4-204, 20-4-207, MCA. Finally, another example involves the resolution of disputes concerning the provision of special education under federal law, which are also subject to a mandated administrative process that must be exhausted. *See e.g.* 20 U.S.C. § 1415.

Thus, an individual aggrieved by decisions of a Montana school board has immediate access to specific procedures tailored to address such disputes. These state and federal administrative procedures are mandatory and the resulting decisions are subject to judicial review.

Nevertheless, Montana school boards and school districts are frequently sued in tribal courts over the manner in which they conduct their affairs. MSBA estimates its School Boards and the Districts they represent have been sued in tribal courts in actions similar to the examples provided below more than fifty (50) times in the last three years. Largely because of the operation of the exhaustion doctrine at issue in this case, these school districts and their elected boards find their ability to govern the district, even their ability to use their expertise to best provide educational opportunities to their students, undermined and compromised.

In one case, a school board voted to expel a sixth grade student after her violent assault on a younger student. The expelled student and her parents first appealed the decision through the state administrative procedures. Growing impatient with that, they sought to overturn the expulsion and to force her immediate readmittance by suing the school district in tribal court. At a hearing in May of this year, the tribal court refused to dismiss the matter for want of jurisdiction based on *Strate, et al. v. A-1 Contractors, et al.*, —— U.S. ——, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), ordered an evaluation of the student for special needs even though district personnel had already considered and rejected that course of action, and ordered the readmittance of the student. The school district, under threat of enforcement of the tribal court's order, had to assemble an evaluation team and expend money and time to conduct an evaluation it deemed unnecessary, a judgment the results proved. Most importantly, it also had to re-admit the student to the same classroom her victim was in.[2]

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[2] After the tribal court refused to dismiss the action and, perforce, after it complied with the tribal court's oral orders, the District instituted a federal declaratory judgment action to prevent further tribal court intervention in its governance of schools. *Glacier County School District No. 50 v. Galbreath, et al.*, No. CV-

In another case, a teacher sued a school district in tribal court for allegedly discriminating against her in its hiring process. The plaintiff claimed that (1) she was entitled to a state-law hiring preference based on her alleged "handicapped" status and (2) she was entitled to a hiring preference because she was Native American. Apart from the fact that the state-law handicapped "preference" upon which the plaintiff's claim was based does not apply to school districts, it contains its own specific enforcement scheme in state court. *See* § 39-30-207, MCA. This represents another instance of the exhaustion doctrine facilitating a party's desire to circumvent the procedures in state law for resolving their disputes with a school board. Consequently, in the face of the exhaustion doctrine and the limited financial resources of small school districts in Montana, this school district decided it cannot afford to pursue a challenge to the tribal court's jurisdiction and must litigate the matter in tribal court.

B. D.H. Blattner & Sons, Inc.

Blattner is a Minnesota corporation, the primary business of which is the construction and re-construction of state and federal highways. In the course of this work, Blattner has bid on projects throughout the West and midwest. Most of these states contain Indian reservations.

In 1996, Blattner bid on and won a contract with Montana to do construction work on a portion of U.S. Highway 2 that is within the exterior boundaries of the Blackfeet reservation. Montana had constructed the highway and since then has maintained it. The State owns the easement over which this highway runs, the federal government having granted the right of way under 25 U.S.C. § 311. *See Wilson v. Marchington*, —— F.3d ——, 1997 WL 583704 (9th Cir. 1997). On the project, an

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97-061-GF. The federal court ruled in favor of the district December 8, 1997. The tribal defendants have moved for reconsideration, in part on grounds of mootness.

employee of a subcontractor for Blattner suffered a work-related injury covered by Montana's worker's compensation laws. That gentleman and his wife and children, however, also sued Blattner and the State in Tribal Court seeking additional remedies, including punitive damages. The plaintiffs are tribal members.

Blattner and the State moved to dismiss the tribal court action for lack of jurisdiction. They also sought preliminary injunctive relief from the federal district court in Montana. The tribal court denied the motions, finding that it has jurisdiction by virtue of the fact that the plaintiffs are tribal members. It distinguished this Court's decision in *Strate*, 117 S.Ct. 1404 (1997), on that basis. It pointed out that each of the three levels of the Blackfeet tribal court system had already addressed the issue and found in favor of tribal court jurisdiction. As in the case before the Court in the instant Petition, there is no means of appealing this ruling within the tribal court system prior to a trial on the merits.

Blattner and the State argued to the federal district court that the tribal court clearly lacks jurisdiction over them under this Court's decisions, most recently, *Strate*, 117 S.Ct. 1404. *State of Montana and D.H. Blattner & Sons, Inc. v. Bremner*, 971 F.Supp. 436 (D.Mont. 1997). In addition, they argued they are not required to exhaust tribal remedies under the doctrine established in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 85 L. Ed. 2d 818, 105 S.Ct. 2447 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L. Ed. 2d 10 (1987). Blattner argued not only that the holding of *Strate* made it plain the Tribal Court lacks jurisdiction but also that the Court's outline of the applicability of the exhaustion doctrine in footnote 14 of *Strate* clearly showed exhaustion was not required. *Strate*, 117 S.Ct. at 1415, n.14.

Unlike the Court of Appeals in this case, the district court did not dismiss the applicability of the Court's dis-

cussion of this doctrine in *Strate*. It recognized Blattner and the State are non-tribal entities and that their activity at issue took place on non-tribal land, thus bringing this case within the "main rule" stated in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L. Ed. 2d 493 (1981). *Montana v. Bremner*, 971 F. Supp. at 437. However, it held that the fact the plaintiffs are tribal members distinguished the suit against Blattner from *Strate*, and it ruled that injury to one tribal member suffices to meet the requirements of the second exception to *Montana*'s main rule. *Id.* at 437-438. Consequently, the district court found *Strate* inapplicable and required Blattner to exhaust all tribal remedies prior to seeking relief in federal court. *Id.* at 439.[3] Thus, because of this rigid application of the exhaustion doctrine, Blattner is faced with protracted litigation on the merits in tribal court before it can receive relief on the jurisdictional issue from a federal court.

These *amici* urge the Court to review the Petition here because in doing so it can clarify, for them and many other litigants, the workings of the tribal exhaustion doctrine, thereby saving these litigants, tribal courts, and federal courts great amounts of judicial and litigant resources.

ARGUMENT

I. A MECHANISTIC APPLICATION OF THE EXHAUSTION DOCTRINE, IN CONFLICT WITH THIS COURT'S DIRECTION, RESULTS IN INCURSIONS ON IMPORTANT ASPECTS OF FEDERALISM.

1. The scope of a tribe's retained inherent sovereign authority is a federal question, over which federal courts

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[3] Blattner and the State appealed the ruling to the Ninth Circuit Court of Appeals. *State of Montana and D.H. Blattner & Sons, Inc. v. Bremner*, No. 97-35798 and No. 97-35816. That appeal is pending. The tribal court denied a motion to stay its proceedings during the federal court action. The parties there are now engaged in discovery.

have unquestioned jurisdiction. *National Farmers*, 471 U.S. 845, 849, 28 U.S.C. § 1331. In a series of cases, the Court developed an analytical model to determine whether in a particular situation a tribe retained authority over nonmembers in light of its incorporation into the United States. *Strate, et al. v. A-1 Contractors, et al.*, —— U.S. ——, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993), *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989), *Montana*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209, (1978). Federal courts have an almost unflagging obligation to exercise their jurisdiction. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In addition to their role as the guardian of federal rights, *Steffel v. Thompson*, 415 U.S. 452, 463, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), this obligation arises from the fact that the resolution of federal issues often depends on the underlying facts. "How the facts are found will often dictate the decision of federal claims." *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416-417, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

2. *Amici* assert the application of the doctrine requiring the exhaustion of tribal remedies should be clearly delineated and closely cabined to protect fundamental interests, such as the federalism interests so often implicated in cases such as this one. Mechanistic obeisance to assertions of tribal jurisdiction, even when such assertions, as here, appear implausible under controlling decisions of this Court, sacrifices these interests as a practical matter. *Amici* do not suggest the federal policies identified in *National Farmers* and *Iowa Mutual* as supporting a pru-

dential rule of deference to tribal courts, in the proper case, do not require federal courts' full consideration. Nor do they suggest these decisions should be reversed or reduced. Congress has in fact fulsomely supported the flowering of tribal governments and courts. Congress has recognized and helped fund their role in protecting and exercising existing tribal sovereignty.

But in doing so Congress has not expanded tribal sovereignty. Nor can it be implied that it had the objective, in supporting tribes and their courts, to promote the violation of federal laws limiting tribal jurisdiction over nonmembers by allowing tribes to "assert and protect excessively claimed sovereignty," *Yellowstone County v. Pease*, 96 F.3d 1169, 1175, n. 5 (9th Cir. 1996), *cert. denied, Pease v. Yellowstone County*, —— U.S. ——, 117 S.Ct. 1691 (1997), from meaningful challenge by using the doctrine of exhaustion of tribal remedies as a shield for such tenuous assertions. The prudential exhaustion doctrine these congressional policies support was never intended to prevent federal courts from actually analyzing the competing interests and the legal basis of the assertion of tribal jurisdiction. But in many cases, including this one, that is precisely what has occurred. *Texaco v. Zah*, 5 F.3d 1374 (10th Cir. 1993), *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), *Reservation Telephone Cooperative v. Three Affiliated Tribes*, 76 F.3d 181 (8th Cir. 1996), *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991), *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61 (2d Cir. 1997). There are decisions in conflict with this trend, *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993), *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir. 1993), a sufficient reason to grant the writ in itself, but they are in the minority, an even better reason to grant the writ.

3. To avoid the practical nullification of vital elements of federalism, whether the clear import of federal acts or

the free use of a State's sovereign authority to operate schools or repair roads, this doctrine must be applied with sensitivity to these fundamental state and federal interests and to the viability of the particular assertion of tribal authority, whether regulatory or adjudicatory, at issue. Assertions of excessive jurisdiction unsupported by the law as established by this Court cannot create tribal sovereignty where it does not exist, *Yellowstone County v. Pease*, 96 F.3d 1169, 1175, n.5 (9th Cir. 1996), *cert. denied, Pease v. Yellowstone County*, —— U.S. ——, 117 S.Ct. 1691 (1997), quoting with approval *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996) (en banc); *and see South Dakota v. Bourland*, 508 U.S. at 695, n.15, and should not be shielded from efficient disposition by federal courts. It would not further Congress' policies to require federal courts to defer to tribal courts and administrative agencies on federal questions where it appears under applicable federal law the tribe either simply cannot have jurisdiction or must make such an exceptional factual showing to establish its "very narrow" authority over nonmembers (*County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)) that success is unlikely.

Thus, in cases where it is plain that, in all likelihood, the tribe lacks the asserted jurisdiction, the model outlined in *Strate* at footnote fourteen (14) for deciding this issue and not requiring exhaustion of tribal remedies should be applied. There, the Court noted that when the issue concerns assertions of tribal jurisdiction over nonmember conduct on non-tribal land, *Montana*'s "main rule" applies —that is tribes generally lack authority over the conduct but for exceptional circumstances—and exhaustion would serve no purpose other than delay. This does not preordain the outcome of a challenge to a tribe's assertion of jurisdiction over nonmember conduct on non-tribal land. It does recognize, however, that such an assertion

runs counter to the general rule, that for the assertion to be made good the tribe will have to make a very strong factual showing under one of the *Montana* exceptions, and that, particularly since the issue is factually dependent, the federal court should make the factual findings to resolve the federal question. *England*, 375 U.S. at 416-417.

4. The workings of the tribal exhaustion doctrine in this case as well as those in which tribal sovereignty over nonmember conduct on non-tribal land has been asserted raise important issues of federalism. Here it is evident that vital federal interests, such as the efficient working of the nuclear regulatory and remedial scheme, are at stake. Just as important from a federal constitutional perspective are the federalism interests implicated by incursions into and erosions of a State's sovereignty by excessive assertions of tribal jurisdiction shielded from efficient examination and disposition by this doctrine.

The mechanistic application of this doctrine upsets these interests, eroding, perhaps evading the governmental power and responsibility from which they derive. On the one hand, it requires the Petitioners here to defend, on the merits, nuclear torts which Congress plainly intended to be litigated in federal courts if the Defendant so wished. On the other hand, it requires School Districts and companies that have contracted with a State to repair and construct highways to engage in a full litigation on the merits in tribal court of actions arising from their conduct on non-tribal land. Indeed, in the case of School Districts, it requires them to proceed through this protracted process while refraining from actions they believe they can and should take under state law—for example, the expulsion of a violent student—to safeguard the health and welfare of the other students.

Meaningful federalism requires constant attention to maintain the delicate balance between national requirements and significant independent freedom of governance on the part of states. *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992). The

federal system established in the Constitution does not provide a role for Indian tribes as sovereign governing entities. The exercise of their existing jurisdiction within limits established by law presents its own, not insurmountable, difficulties. The practical difficulties of maintaining the reality of a vibrant federalism between the states and the federal government would be magnified literally three or four hundred times if tribes were found as a general matter to possess inherent sovereign power, contrary to the strong presumption, over nonmembers. But that, of course, is not the general rule. *Montana v. United States*, 450 U.S. 544 (1981). Quite the contrary. *Strate*, 117 S. Ct. 1404. If the plain rules could be efficiently applied to excessive claims of tribal sovereignty, tribes' existing, pre-constitutional power, unfettered by either state or federal constitutional concerns, would co-exist more readily with the powers established in the Constitution.

II. THE BENEFITS OF THIS COURT'S DECISIONS DELINEATING THE CONTOURS OF TRIBAL JURISDICTION ARE FRUSTRATED AND UNREALIZED BY LITIGANTS AND COURTS AS THE RESULT OF THE INFLEXIBLE APPLICATION OF THIS DOCTRINE.

1. The Court's decisions in the last two decades have brought a great degree of clarity to the question of the scope of tribal inherent sovereignty over nonmembers and their activities in a variety of situations. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *United States v. Wheeler*, 435 U.S. 313 (1978), *Montana v. United States*, 450 U.S. 544 (1981), *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130, 102 S. Ct. 894, 71 L.Ed.2d 21 (1982), *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), *South Dakota v. Bourland*, 508 U.S. 679, *Strate, et al. v. A-1 Contractors, et al.*, 117 S. Ct. 1404. For example, only last term the Court found its decisions so clear as to the probable outcome of jurisdictional disputes when the issue concerns whether a tribe retains sovereign authority over nonmember activity on non-tribal land within a reser-

vation—that is, land covered by *Montana*'s "main rule"—that it declared exhaustion of tribal remedies unnecessary. *Strate*, 117 S. Ct. 1404, n.14.

However, the application of the general rules, including clear pronouncements of this Court, has been obstructed not only by claims of excessive jurisdiction on the part of tribes, which the federal courts should be able to analyze and decide in a timely manner, but also by a mechanistic application of the doctrine at issue here. Because of this, the Court's clear decisions and its vigilance in matters of federalism are left unapplied. Even though the applicable substantive rules for resolution of this federal question aim in large part at preserving the important federalism interests implicated by tribes' excessive assertions of authority, economic, jurisprudential, and governmental 'balkanization" far more fragmenting than any possible among the States takes place by default, while litigants either exhaust tribal remedies or give up the defense of these interests in the face of the costs of this doctrine.

In almost all the reported cases neither litigants nor courts, whether tribal, state, or federal, have received the benefit of this clarity in the Court's decisions in terms of an efficient, timely disposition of the issue. Indeed, the *Strate* case itself consumed 6 years of litigant and court resources exhausting remedies in tribal courts, including a tribal appellate court lacking any connection at all to the nonmember defendants in the case except that the tribe in whose court they were sued had elected to be a part of that voluntary judicial review system. In that case, at least, the Respondents had the good fortune of dealing with a court system that would deal with the jurisdictional issue at the outset and allow an appeal of that determination. In the instant case and in many others, the tribal courts do not allow interlocutory appeals of jurisdictional determinations. Thus, whereas it took *Strate* 6 years to be resolved, it may easily take twice as long and cost ten times as much to fully try a case on the merits in order

to reach the point where the Court's decisions, such as *Strate,* will be applied.

This has left many litigants in an untenable position. Some, such as Burlington Northern Railroad in *Burlington Northern Railroad v. Red Wolf,* 106 F.3d 868 (9th Cir. 1997), Kleinfeld, J. dissenting, *certiorari* granted, judgment vacated and remanded, *BNRR v. Red Wolf,* —— U.S. ——, 118 S.Ct. (1997), are constrained to pursue the jurisdictional challenge to the end. But many litigants cannot afford to protect their rights, and they are truly exhausted by this doctrine. For example, one School District, the elected Board of which is an MSBA member, has routinely decided not to challenge the tribal court's jurisdiction over its affairs, not because the substantive law is against it but because of the mechanistic application of the exhaustion doctrine.

CONCLUSION

Petitioner stated compelling reasons to grant the requested writ. The federal regulatory scheme is pervasive and the national importance of both that regime and uniformity in its application cannot be overstated. Congress' entrustment of the issues raised by the underlying case to a well-defined federal remedial system, and the policy goals that system advances, would be defeated if it is not plain that these acts eliminated any tribal authority over these issues. *Amici* respectfully suggest the instant Petition presents the opportunity for the Court to establish the clear rules necessary for litigants and courts to understand when they must litigate the issue through a tribal system and when the issue of jurisdiction can first be decided in a federal court prior to exhausting all tribal remedies. If this opportunity is taken and fully developed, not only litigants but tribal and federal courts would see their time better spent on the merits of these issues rather than on protracted preliminary skirmishes over the application of this doctrine.

Respectfully submitted,

JON METROPOULOS
Counsel of Record
GOUGH, SHANAHAN, JOHNSON
& WATERMAN
P.O. Box 1715
Helena, MT 59624-1715
(406) 442-8560